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Department of Justice

STATEMENT

OF

PHILIP B. HEYMANN
ASSISTANT ATTORNEY GENERAL

BEFORE

SUBCOMMITTEE ON THE CONSTITUTION
JUDICIARY COMMITTEE
UNITED STATES SENATE

CONCERNING

ZURCHER V. STANFORD DAILY

ON

DECEMBER 19, 1978

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STATEMENT OF ASSISTANT ATTORNEY GENERAL PHILIP B. HEYMANN

Mr. Chairman and members of the Subcommittee:

Introduction

About six months ago I was privileged to appear before this Subcommittee to discuss the various problems troubling many in Congress and the country arising from the Supreme Court's decision in Zurcher v. Stanford Daily, _____ U.S. _____, 98 S. Ct. 1970 (1978).

I mentioned the difficulties involved in attempting to deal with those problems by federal legislation, and I advised that, as had been announced publicly on June 14, 1978, President Carter had directed the Department of Justice to make a careful study of the issues and of the possibilities of legislating solutions to the problems raised by the Stanford Daily case.

As a result of the President's order, a task force was created in the Department, under my direction, to examine all the issues and submit to the Attorney General a comprehensive set of options. An option paper, together with my recommendations, was presented first to the Deputy Attorney General and then to the Attorney General, who accepted the basic recommendations, made some modifications, and forwarded the resulting product to the President. As you know, the President recently announced the Administration position endorsing that recommendation.

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I am, therefore, particularly pleased to be here today to discuss the major outlines of the Administration's proposal. The proposal would have effectively outlawed the search conducted in the Stanford Daily case and it would, in addition, afford wide-ranging protections to anyone engaged in information-gathering and dissemination activities basic to the First Amendment.

The Legislative Proposal

Since this Subcommittee is well acquainted with the various opinions in the Stanford Daily decision, as well as with the complex legal and legislative issues generated by those opinions, I shall not take the time here to retraverse that familar ground, but shall instead simply turn to our proposal.

It protects First Amendment materials from searches by federal, state, or local officials. It would prohibit, with only two narrow exceptions, searches and seizures for the "work product" of any person (not merely the press) possessing such materials in connection with the dissemination to the public of a newspaper, book, broadcast, or other similar form of public communication in or affecting interstate or foreign commerce. "Work product" would be defined as any documentary materials created by or for an individual in connection with his plans to disseminate information to the public. It includes notes, photographs, tapes, outtakes, videotapes, negatives, films, interview files, and drafts. "Work product" does not include

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materials which constitute contraband or are the fruits or instrumentalities of a crime. By way of illustration, this protection of work product would forbid any search for unpublished photographs of a demonstration or disorder, for a reporter's notes relating to tips about fraudulent deals provided by a government whistle-blower, or for a taped interview by an author or newsperson with a suspected criminal who was in custody.

The only exceptions to this general no-search rule for work product would be (1) where the person possessing the materials has committed or is committing the crime for which the evidence is sought, and (2) where the immediate seizure of the materials may be necessary to prevent death or serious bodily injury to a human being.

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Documentary materials that are not work product -- either because they were not created by or for the press or because they constituted contraband or are the fruits or instrumentalities of a crime -- would not be covered by the "no search" rule. However, since a search for such documents may necessitate rummaging through the files of an academician, an author, or a reporter, we propose giving these documents the protection of a "subpoena-first" rule. Thus, the proposal would require law enforcement officers to seek documentary instrumentalities of a crime like an extortion note or critical evidentiary documents not created by or for the press through the subpoena process prior to engaging in a search. The subpoenaed party could, in accordance with existing law, challenge the validity of the subpoena in court.

The subpoena-first rule would be subject to the same two exceptions applicable to "work product" materials governed by the no-search principle. In addition, for documents that are not "work product," the subpoena-first rule would have a third exception -- when giving notice pursuant to a subpoena would result in the destruction, alteration, or concealment of the materials. In addition to the three exceptions to the subpoena-first rule, a search could be conducted prior to exhaustion

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of all appellate remedies available in the subpoena process where delay in an investigation or trial occasioned by review proceedings after an initial court order to deliver the documents in response to a subpoena would threaten the interests of justice. Time constraints imposed by the Speedy Trial Act, statutes of limitations, or the expiration of grand juries, for example, might prompt an attempt to qualify for this final exception. However, in all cases where the delay exception is involved, the possessor of the materials would be given notice and an opportunity to submit an affidavit setting forth the basis for any contention that the materials sought were not subject to seizure.

Finally, the proposal would be enforced through a civil damage action in favor of any person subjected to a search in violation of the requirements of the statute. Violations committed by federal officers and agents would be governed by the procedure contained in amendments to the Federal Tort Claims Act that have been proposed by the Administration. That procedure combines a damage action against the federal government with administrative sanctions where warranted against the offending individual officers. Violations committed by local or municipal employees would trigger a damage remedy against the governmental body employing the local law enforcement official. Obstacles posed by the Eleventh Amendment rights of the states would preclude the creation of a damage remedy against the state governments as part of federal legislation. As a result,

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the Administration proposal would create a damage action against the offending state officer unless and until the state passed legislation of its own substituting the state for the individual officer as the party responsible for the payment of damages to the victim of the search.

Advantages of the Proposal

The Administration's proposal offers a number of important benefits. I will briefly describe several of these advantages.

First, the proposal avoids the difficulty of attempting to define "the press." It was this very problem that contributed to the inability of Congress to agree on a federal "shield law" for the press.

Second, it provides protection to a broad class of persons engaged in important First Amendment activities. The proposal affords academicians and free-lance writers the same protections as radio and television networks, newspapers, and magazines.

Third, by focusing on the class of materials basic to persons who disseminate information to the public, the proposal will provide those materials almost absolute protection against search and seizure. As a result, it will permit the press and others who rely on confidential sources in gathering information to insure that their sources' identities will not be compromised through police searches.

Fourth, the proposal extends to searches by state and local officers as well as federal agents, thereby dealing with the danger of searches at all governmental levels.

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Protection of Law Enforcement Interests

The Administration proposal was designed to offer extensive protection to information-gathering activities basic to First Amendment rights. We also, however, took care to ensure that the government reserved authority to conduct essential searches. We recognize that the most ordinary of crimes could be carried out by reporters or others from the sanctuary of a newsroom if the place were itself not subject to search. Even though the federal government has never searched the press and state searches have been rarely employed, it is important that law enforcement retain the ultimate ability to maintain public safety.

The proposal safeguards law enforcement interests in part because it does not affect the ability of police to search for non-documentary materials. Given the breadth of the proposed "no search" protection, it is crucial to preserve the option of searching for evidence that is not closely related to the preparation of public communications. For example, this proposal would not limit the police's ability to search for weapons, drugs, or the ski masks used in a bank robbery. Searches that provide an opportunity to rummage through documents and thereby chill free expression are not permitted; searches that secure the non-communicative tools of crime are.

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The "suspect exception" provides another necessary protection for law enforcement. This exception permits the police to search for evidence in the possession of a suspected criminal who seeks to cloak his activity by asserting that he is holding the materials sought for publication purposes. Without this option, recognized by all but one of the bills introduced to date, search protection could easily result in creating artificial evidence sanctuaries for criminals.

The "danger-to-life" exception permits a showing that a search is immediately necessary to prevent imminent bodily harm. Law enforcement officials must investigate kidnappings, psychotic murderers, and terrorist threats as well as crimes that do not bring life into the balance. The Administration proposal recognizes that searches may be necessary in these extreme cases; this exception reflects our fundamental and overriding concern for human safety.

Finally, the suggested legislation would allow the police to follow "subpoena-first" procedures for documentary instrumentalities, fruits, and contraband as well as other non-work product documentary materials. These materials, like an extortion note, are intimately related to the crime under investigation and therefore cannot be subject to a "no search" rule because they cannot be duplicated by more vigorous investigative effort. Non-work product documentary materials

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are still carefully safeguarded by a subpoena-first rule subject to specified exceptions but their ultimate availability to the police, by search if necessary, will prevent the loss of crucial evidence.

Third Party Searches

The option of providing safeguards against searches of all third parties received careful consideration. Our review revealed serious problems presented by a general prohibition against searches of third parties. Several of these are noted below.

A fundamental problem with such an approach is the serious constitutional questions about the federal government's authority to legislate a prohibition of all third party searches applicable to state and local governments. These constitutional doubts discouraged us from proposing broad third party protections. In addition, there are sound policy reasons why a broad First Amendment bill is preferable to third party legislation.

The primary weakness of broad third party search proposals is that they are likely to prove unworkable. Unlike a First Amendment oriented proposal, which can focus protections on the fundamental work product materials of a narrower class of third parties, a broad third party bill would constrain law enforcement investigations in an extremely large number of situations. The breadth of this third party coverage would necessitate more and vaguer exeptions, which significantly limit the nature of the protection afforded.

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Congressional proposals to safeguard third parties generally exclude from protection a holder of evidence who either is "involved" in the criminal activity or is likely to destroy or conceal the evidence sought. If magistrates rule that these exceptions are triggered by simply establishing a relationship between the third party and the suspect (most often a friend or relative), the protections will often be useless. But if greater proof of probable destruction or involvement is required, law enforcement authorities are unlikely to be able to substantiate their judgment during the early stages of investigation. For example, even the identity of conspirators is frequently unknown during the period when the evidence is sought.

The difficulty of determining who is actually an innocent third party leads to more than drafting problems. Broad third party safeguards are more likely to create evidence sanctuaries then are First Amendment protections. Law enforcement officers would be put in the unenviable position of having to determine whether friends, relatives, or associates of a suspect were willing to secrete or destroy evidence. The task of proving the involvement of potential sympathizers would drain resources, perhaps prove more intrusive than a search, and could alert suspects.

The burdens of third party protections extend to the operations of the judicial system. The challenge of defining and proving third party involvement will permit additional litigation concerning the validity of warrants. The government may be forced to relitigate [illegible] issue

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of whether the subject was a suspect or whether a subpoena would have sufficed. In addition, since grand juries are not in continuous session in many federal districts, a requirement of "subpoena first" or "subpoena only" for all third parties is likely to involve considerable delay in investigations.

These concerns about third party search prohibitions are reinforced by a survey we conducted of the third party search policies and practices of the United States Attorneys throughout the nation. In general, we found that although third party searches are relatively rare, limits on their use are likely to interfere with a number of important investigations.

In summation, after reviewing the serious constitutional questions, the policy problems, and the empirical evidence, we believe that broad third party protection would clearly cause more problems than it could prevent.

Conclusion

The preservation of a free press, and of First Amendment values generally, involves providing assurance that the confidentiality of sources and of information - gathering activities is secure from the government's power to search files and newsrooms. The Administration believes that this proposal strikes the appropriate balance between freedom of the press and the maintenance of public safety. We suggest that those materials which are fundamental to the work of people who disseminate information in interstate or foreign commerce should be guarded more carefully than they would be

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under virtually any of the proposals that have been introduced to date. All documents held in connection with publication are protected to avoid dangers of rummaging. Our proposal also makes it possible for the evidence basic to law enforcement and not closely related to information-gathering and dissemination to be acquired by the government under legal process.

Moreover, this proposal is workable and constitutional. It limits court arguments over conditions which justify a search by avoiding questionable exceptions. It circumvents a battle over defining the press by making a broad construction acceptable to law enforcement. And it relies on the farthest reach of the Commerce power to ensure the fullest protection of First Amendment materials.

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